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July 10. 1766.

ANSWERS

FOR

Messieurs *Cross* and *Bogle*, *George Brown* and others, Merchants in *Glasgow*, Creditors of *M'Farlane* and *Thomson*;

TO

The PETITION of *George Anderson*, Merchant in *Glasgow*, and others, Trustees for the Creditors of *John Glen* of *Asslos*, late Merchant in *Glasgow*, now in *Kilmarnock*; and the said *John Glen*, for himself, and as Factor for the said Trustees.

DAvid M'Farlane, who is merchant, in company with Robert Thomson in the island of St Christopher's, came to Scotland several years ago, in order to purchase goods upon the account of the company, and returned again to the West-Indies, leaving considerable debts due by him to several merchants in Glasgow, for these purchases. This company having proved successful in their trade in the West-Indies, and their circumstances being in a good situation, they resolved, as early as it was in their power, to make remittances to this country, for the payment of these creditors.

They first made remittances by bills of exchange; but these having been returned dishonoured, M'Farlane, who had company-cash in his hands, therewith purchased sugars, and, on the 18th September 1764, wrote letters from the island of St Christopher's to the company-creditors in Scotland, advising them of the return of the bills of exchange, and of his having shipped 70 hogsheads

 of

of ſugar aboard the Triton, Captain Towers, conſigned to James King *ſenior*, merchant in Port-Glaſgow, ordering him to apply the proceeds of this cargo towards their payment.

Sept. 26. 1764. On the 26th of September, he wrote a letter to Mr James King, which was tranſmitted, together with the cargo conſigned to him, acquainting him with the purpoſe for which the cargo was ſent, and mentioning the proportion in which he was to pay the proceeds of the cargo to the different creditors.

This letter to Mr King ſhall be here inſerted, for your Lordſhips ſatisfaction; and is as follows: "St Croix, 26th September "1764, Mr James King *ſenior*, Sir, Referring you to my other "letters by this veſſel, this only ſerves to incloſe you invoice and "bill of loading for 70 hogſheads ſugar, ſhipped you by the "Triton, Captain Towers, on my own private accompt. Coſt, "with all charges here, *L.* 1115 : 12 : 6 currency, which I wiſh "ſafe home and to a good market. They are all purchaſed with "caſh, and, I am perſuaded, will turn out to advantage. I have "been obliged to draw on you, in favour of Mr John Penman, at "90 days ſight, for *L.* 100 Sterling, which you will pay when "due. I have alſo wrote to ſeveral people in Glaſgow, and deſired "them to apply to you for the ſeveral ſums of money, which "you'll ſee by the particular liſt at the foot of this letter, which "amounts in all to *L* 800: 18 : 3¼ Sterling, which is more than "my ſugars can neat; but whatever they may be ſhort, you'll "pleaſe take it out of the proceeds of Mr Tennent's and my "joint ſugars, ſhipped you by this veſſel, and our intereſt in the "ſchooner."

Upon the receiving this letter, Mr King inſured the veſſel and cargo. And though the letter bears the ſhipping to be on M'Farlane's own private accompt, yet as the proceeds were wholly deſtinated to pay the company-debts of M'Farlane and Thomſon, ſo they could eaſily be proved to have been the effects of that company; and M'Farlane's reaſon for ſaying they were ſhipped on his private accompt, was to diſtinguiſh them from the ſugars, the joint property of him and Tennent, mentioned in the ſame letter.

The reſpondents, the creditors of M'Farlane and Thomſon, are well informed, that the principal debts owing to that Company, are due by the inhabitants of St Croix; and that M'Farlane is there at preſent, collecting the ſame, thereby at once to make a full remittance of all they owe, to prevent all poſſibility of future attachments;

tachments; and there is reason to believe, that M'Farlane would have made other partial remittances by this time, had not the notice he has got of the arrestments now in question prevented him.

The vessel, with the cargo of sugars, having arrived safely in the harbour of Port-Glasgow; and the creditors of M'Farlane and Thomson having applied for payment, Mr King wrote to most of them, acknowledging his having received the cargo consigned to him by M'Farlane and Thomson, and promising to apply the proceeds as he had been directed; and he made the like notification and promise to the rest verbally.

After this, Mr John Glen, or his trustees, to whom M'Farlane and Thomson had appointed a proportion of the proceeds to be paid, thought proper, of this date, to use arrestments in the hands of Mr King. Mr King, upon his part, raised a process of multiple-poinding, calling all parties into the field; and accordingly a competition has arisen between the petitioners-arresters, and the other creditors for whose payment the cargo was consigned. This question having come before the Lord Auchinleck Ordinary, his Lordship was pleased, on the 6th of February last, to pronounce the following interlocutor: "The Lord Ordinary "having considered the missive, produced by Messr. Stark, Cross, "and Company, with the reasons for preferring them in con-"sequence thereof, and the memorial for John Glen's trustees in "answer to these reasons, finds Glen's creditors having habily "arrested the common debtor's effects, in Mr King's hands, be-"fore he had made payment of the money directed, he, Mr King, "remained accountable to the common debtor, and the effects "remained the property of the common debtor, who had it in "his power, if he pleased, to countermand the order given; and "therefore prefers the trustees for Glen and company, and de-"cerns in the preference, and against the raisers of the multiple-"poinding."

16th and 20th Jan. 1765.

Feb. 6. 1766.

Against this interlocutor the respondents offered a representation, in which they stated their claim, and the arguments in support of it, more fully than they had formerly done; and the Lord Ordinary having considered the representation, with the answers, was pleased, on the 6th of March last, to pronounce the following interlocutor: "Finds the goods consigned with King, for be-"hoof of his creditors specified in the letter, and to whom he "notified

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" notified the ſaid conſignation, could not be habilely arreſted, in
" prejudice of the perſons in whoſe favour the conſignment was
" made; and therefore finds that Glen's truſtees can take nothing
" by their arreſtment."

Againſt this interlocutor the truſtees of Glen, the arreſters, have reclaimed; and your Lordſhips having appointed that petition to be anſwered, the following anſwers are humbly offered on the part of thoſe creditors, for whoſe payment the cargo was conſigned.

It is to be obſerved, That the debtors, M'Farlane and Thomſon, are here applying their money gradually to the payment of their creditors in Scotland, in proportion as they have become enabled to do ſo by the ſucceſs of their trade in the Weſt-Indies. The very lateſt advices from the iſland of St Kitt's inform us, that this company is of unſuſpected credit, and in a very proſperous ſituation. In a very few months they propoſe to make remittances to Scotland, ſufficient to pay every ſhilling that they owe. In the mean time, they have ſent home as much as they could juſt now conveniently ſpare, conſigned into the hands of a merchant in this country, for the behoof of their creditors; and deſiring ſome ſmall debts to be paid off altogether, and the reſt of the procceds to be diſtributed, not in the total payment of any one of the remaining creditors, but equally amongſt them all.

The attempt of the petitioners to prevent this fair and honeſt diſtribution made by the debtors, cannot ſurely meet with approbation. If merchants abroad, who owe debts in this country, ſhall not have it in their power, even when their credit is unſuſpected, to make remittances to pay their creditors in the fair and juſt manner which theſe gentlemen have followed, without having the whole ſnatched away by ſome ſingle more rapacious creditor, it may perhaps be dreaded, that either ſuch remittances will be ſeldom made, or ſome ſubterfuge employed, which may be of very dangerous conſequence.

The reſpondents apprehend, that when this cargo, conſigned to Mr King for their behoof, arrived at Port-Glaſgow, they had acquired ſuch an intereſt in it, and it was ſo much appropriated to them, as entirely to prevent its being attached by any other of the creditors of M'Farlane and Thomſon. They apprehend, that as ſoon as the goods had been inſured and received by Mr King, they

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continued no longer the property of M'Farlane and Thomſon, but became the property of Mr King, the truſtee of the creditors.

The reſpondents might maintain, upon the authority of ſome of your Lordſhips deciſions, that ſums in the hands of a third party, deſtined for a particular purpoſe, could not be affected by the arreſtments of creditors. They might maintain, that often, from a tranſaction betwixt two perſons, there did ariſe a right to a third, though ignorant of that tranſaction; which right could not be recalled either by the parties themſelves, or be affected by the arreſtments of their creditors.

They do not however apprehend it to be neceſſary, to go ſo far in order to ſupport their preſent claim. Your Lordſhips will obſerve, that when M'Farlane ſent theſe goods from the Weſt-Indies, to be put into the hands of Mr King, for the ſpecial purpoſe of paying theſe creditors, he, at the ſame time, wrote letters to all his creditors, informing them of what he had done, and deſiring them to apply to Mr King for payment. This, they humbly conceive, was, in effect, an aſſignation to thoſe particular ſubjects, which were ſent ſolely for the purpoſe of paying their creditors. It reſembles the caſe of a bill payable by a third party, and put into the hands of a creditor; as, in that caſe, the ſum contained in the bill, cannot be arreſted by the creditors of the debtor.

The reſpondents muſt further beg leave to maintain, That after this conſignment of the goods to King, expreſsly for the purpoſe of their payment, and after the letters from M'Farlane to the creditors, authoriſing them to apply to King for payment, Mr King became truſtee for them, took poſſeſſion of the goods for their behoof, and was accountable to them for his application of them. King, it will be remarked, was not employed by M'Farlane and Thomſon to tranſact all their buſineſs in Scotland; he was employed by them as a proper perſon to intruſt with theſe effects, for the payment of their creditors, and he was employed for this purpoſe alone. They apprehend, that as it was no longer in the power of M'Farlane and Thomſon to recal the commiſſion, ſo neither was it in the power of any of their creditors to uſe arreſtments in the hands of King, who had become truſtee for the creditors. The property was transferred from M'Farlane and Thomſon, as ſoon as the goods were inſured and received by King, the truſtee of the creditors; and an arreſtment in his hands, cannot be

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considered as more effectual, than if it had been used in the hands of the creditors themselves.

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They apprehend a late decision of your Lordships, in the case of *Souper* against *the creditors of Smith*, 23d January 1756, to be entirely applicable to their present argument. Smith, the debtor, had, at a meeting of his creditors, written a letter to John Watson, impowering him to sell his effects for the behoof of his creditors. Watson having sold part of the goods, the money was arrested in his hands by Souper, one of the creditors; and a competition arose between this arrester and the whole creditors. The same arguments were employed in that case, as are now urged in the present. "The Lords found, That the goods "sold, and the prices thereof received by Watson, belonged pro-"portionally to the creditors, according to their debts."

The petitioners have alledged, That this decision can have little weight in the present case, as there the mandate had received full execution by the sale, and by the mandatar's receiving the prices. The respondents however, with all submission, apprehend, that that circumstance cannot be supposed to have made any difference, as they cannot perceive that Watson's having sold the effects, either bound him further, or made him more the trustee of the creditors than he had been before.

But further, the respondents must observe, That, in the case now quoted, the plea of the arresters was still stronger than in the present; for there Smith the debtor was insolvent, when here the debtor is in prosperous circumstances.

But further, even if they were to admit, that when the cargo was received by Mr King, the property was not transferred from the debtor, but might be affected by the diligence of his creditors, they apprehend, that this continued no longer to be the case, after the letters which were written, and the promises which were made by King, to all the creditors, for whose behoof the cargo was consigned.

As soon as Mr King had received the cargo, and directions from Mr M'Farlane, concerning the manner in which it was to be applied, he would have immediately paid the creditors their respective proportions, if he had been in cash. He wrote, however, letters to the creditors, acquainting them of the consignment which had been made to him for their behoof, and promising to dispose of it, and to apply the proceeds in the manner directed,

ed, as ſoon as poſſible. Theſe letters were all written, and promiſes made by Mr King, in anſwer to demands made upon him by the creditors, in conſequence of M'Farlane's advice, prior to any arreſtments uſed in his hands; and, as the letters were almoſt all expreſſed nearly in the ſame words, a copy of one of them, which is, indeed, in favour of all the creditors, ſhall be here given: " I have invoice and bill of load-
" ing for 70 hogſheads ſugar, ſhipped for David M'Far-
" lane; the proceeds of which I have orders to apply amongſt
" the different people he owes in Glaſgow, a liſt of whom
" he has ſent me, and obſerves you are one; which ſhall
" be done as ſoon as I am in caſh for them."

Having received, firſt the letter from M'Farlane, and afterwards this letter from King, in anſwer to their demand on him, the reſpondents reſted ſatisfied with the diſtribution of the debtor, readily accepted of this conſignment, and neither uſed arreſtments, nor took any other ſtep of diligence, to ſecure their payment.

The petitioners have been pleaſed to obſerve, That the letter from Mr King to Mr Brown, one of the creditors, bears no date. The reſpondents acknowledge this indeed to be the caſe; but muſt, at the ſame time, remark, that it is an immediate anſwer to a letter writ from Mr Brown to Mr King, in the beginning of December 1764, acquainting him, that the Triton, on board which the ſugars were, had arrived at the Iſle of Man; and that he expected the ſum M'Farlane ordered out of the proceeds. This letter from Mr King is marked by Mr Brown's clerk, to have been received at Glaſgow on the 17th December 1764; and, if it is neceſſary, can be clearly proved to have been writ by Mr King at Port-Glaſgow, on the 16th of December, and received by Mr Brown at Glaſgow, the day following.

It has been further ſaid by the petitioners, That Mr Glen received no ſuch letter or notification from Mr King. The reſpondents, perhaps, may have difficulty in diſproving this; but they cannot help ſuſpecting, that King's notification to Glen produced the arreſtments, as all the other creditors got due notification, and promiſes, from Mr King, as above mentioned. Beſides, the petitioners have produced M'Farlane's letter to Glen, deſiring him, to apply to King for his money.

By theſe promiſes the reſpondents, with ſubmiſſion, apprehend, King became bound to pay to the creditors the ſums aſſigned to them

them in the letter of M'Farlane. King's thus obliging himself to pay to the creditors their proportions of this consignment, would have been a sufficient defence to him against M'Farlane himself, if he had chosen to recal his orders; and there can be no doubt, that every defence competent against the debtor himself, may be urged against arresters. A mandate can only be revoked while matters remain entire; but as soon as matters are no longer entire, the power of recalling it ceases.

As an authority, in support of this argument, the respondents shall mention one very late decision of your Lordships, in a case very similar to the present. It is the case, Stalker against Ayton, 9th February 1759. Trotter, a merchant in Jamaica, sent a cargo of sugars, consigned to Ayton at Glasgow; and, in a letter, desired him, "when he received the proceeds of the cargo, to "discharge certain bills and accompts due by him in Scotland, as "far as the proceeds would go." To this letter he subjoined a list of creditors, to whom these bills and accompts were due, in which Stalker was set down as one. Ayton insured the cargo, and received it, made out an accompt of the proceeds, and allotted a certain share to each of the creditors, in proportion to their debts. All the creditors agreed to accept of this dividend, except Stalker; and Ayton obliged himself to pay to the other creditors their respective shares. The terms of this obligation were as follows: "We, the creditors of the above John Trotter, having examined the above accompt, find the same fairly stated, "and approve thereof; and as the said Andrew Ayton has "agreed to pay us our respective proportions of the above John "Trotter his effects, as above stated, (or what he may or shall receive "of the same), so soon as he is in cash for answering the same," *&c. &c.* Stalker arrested in Ayton's hands, and a competition arose between him and the other creditors. It was urged for the creditors, That when goods are consigned for the payment of certain creditors, the property is so much transferred to these creditors, that the goods are not liable to diligence, by arrestment at the instance of other creditors. And it was further urged, That the arrestment was likewise ineffectual, as Mr Ayton had become bound to pay the dividends agreed upon to the other creditors, out of the proceeds of the cargo; and that they had thereby

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by acquired ſuch a right to the proceeds of this cargo, that it could not be affected by Stalker's after-arreſtment. " The Lords " found, That Mr Ayton was not interpelled by the ſaid arreſt- " ment, from making payment to the creditors, in purſuance " of this obligation."

With regard to this deciſion, the reſpondents cannot diſcover that Ayton's having diſpoſed of the greateſt part of the cargo made any difference in the caſe; and they apprehend, that as he obliged himſelf to pay to the creditors their reſpective proportions of what he ſhould recover, as fixed among themſelves, after the cargo had been received, ſo, in the preſent caſe, King became bound to pay to the creditors, as originally fixed by the debtor himſelf, and acquieſced in by the creditors. They ſhall only obſerve farther, with regard to this caſe, as with regard to the former one, that Trotter the common debtor's circumſtances were much ſuſpected, while thoſe of the preſent debtor's are undoubted.

Upon the whole, they muſt obſerve, That although, before the goods had been inſured by King, and received by him, before he had notified this to the creditors, and promiſed to pay them their proportions, and before M'Farlane's letter to the creditors, and their acceptance of the conſignment for their payment, the property perhaps might have remained the property of M'Farlane, and affectable by the diligence of his creditors, yet they apprehend, that after all this had happened, it was no longer in the power of M'Farlane to recal his orders, nor in the power of his creditors to arreſt theſe effects.

Beſides the cargo of ſugars conſigned to Mr King by M'Farlane and Thomſon, there was in the ſame veſſel a cargo of ſugars, the property of M'Farlane and Tennent, which have likewiſe been arreſted by the petitioners. With regard to theſe, the reſpondents ſhall only obſerve, that they apprehend it was altogether improper in the petitioners, who are creditors only of M'Farlane and Thomſon in company, to arreſt the effects of a different company, with whom they have no concern; and therefore, they hope your Lordſhips will adhere to the laſt interlocutor of the Lord Ordinary.

In reſpect whereof, &c.

ROBERT CULLEN.

That a square Parcel of Sugars, belonging jointly to the said David Wardlaw and John Lemmer, was likewise put on Board the same Ship, and consigned to the said John Kay; and upon the